STATE OF MICHIGAN

COURT OF APPEALS

LINDA KIRKMAN, Plaintiff-Appellant,	UNPUBLISHED December 18, 2014
v	No. 318406 Oakland Circuit Court
MARY ANN ELLIS, Defendant-Appellee.	LC No. 2012-130461-NI

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

The inaptly named "Magnum," a 20-pound Shetland sheep dog standing less than knee high, jumped on a kitchen door at his owner's home. Unfortunately, plaintiff Linda Kirkman, a guest in the home, stood in the doorway. The door struck Kirkman's back and she fell down several steps, fracturing her leg. Kirkman sued Magnum's owner, defendant Mary Ann Ellis, alleging that Ellis negligently failed to restrain and supervise Magnum during Kirkman's visit.

The trial court granted summary disposition to Ellis, ruling that the dog had no "dangerous propensity" warranting isolation or any other protective measures when house guests were present. We agree with the trial court that Magnum's typical canine jumping behavior did not render him a dangerous animal, and affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

The evening of Kirkman's injury began with a birthday party for Kirkman's and Ellis's mutual granddaughter. Kirkman and the other party guests gathered at Ellis's home for cake and ice cream. Kirkman had visited the home on previous occasions and was acquainted with Magnum.

According to Ellis, Magnum was a "lap dog" allowed to roam freely throughout her home.[1] Although Ellis conceded that Magnum was "not friendly" to strangers, she claimed that he never jumped on people. Magnum did, however, occasionally jump on the kitchen door.

[1] Magnum died following a veterinary procedure unrelated to this case.

Ellis explained: "I think he did it for the fun of it. If he was to walk into this kitchen and this door would be open, it wouldn't surprise me if he pushed it closed." Ellis maintained that Magnum's door-jumping escapades had never before knocked the door into anyone.

Kirkman described Magnum as "[s]kittish," elaborating, "[I]t just sort of stayed back and watched you and growled a little but didn't come near me." Kirkman recounted that Magnum laid by Ellis's feet "all the time and she'd pet it." As she was leaving Ellis's house on the day of the accident, Kirkman claimed that Magnum jumped on the door leading from the kitchen to a short stairway, which "slapped me in the rear end and flung me down the rest of the stairs."

Kirkman's complaint asserts that Michigan's dog-bite statute, MCL 287.351, imposes strict liability for Magnum's conduct. Additionally, the complaint charges that Ellis negligently (1) failed to take reasonable precautions to prevent the dog from knocking Kirkman down the stairs, (2) failed to adequately restrain, leash, cage or otherwise secure the dog despite knowledge of the dog's "prior vicious propensities," (3) allowed the dog "to attack a member of the public by failing to adequately restrain such dog," and (4) failed to train, tend, and supervise the dog. Following discovery, Ellis sought summary disposition under MCR 2.116(C)(10), contending that no evidence supported that Magnum had previously displayed unusually aggressive tendencies or an abnormally violent disposition.

Kirkman withdrew her claim under MCL 287.351. In support of her argument that Magnum had previously exhibited vicious propensities warranting protective measures with guests present, Kirkman submitted the affidavit of her son, Corey Boissonneau, who averred that the dog had been aggressive with him or his family on "numerous occasions," and had "at least" four times before "exhibited the same behavior being claimed in this lawsuit against myself, my wife, and my two daughters." Boissonneau further asserted that Ellis had told him "about prior instances where the dog . . . knocked her over by way of slamming the door." Kirkman also cited her own deposition testimony, in which she quoted Ellis's daughter Tonya as having stated that the dog had previously knocked someone down the stairs. Kirkman did not include an affidavit from Tonya with her response to Ellis's summary disposition motion.

The trial court granted defendant's motion, reasoning:

> The Court . . . does agree with the Defendant and in her interpretation of the case law that this is a propensity issue. It's exclusively that the Court's decision is based upon that there was - - it does not establish a propensity or dangerous propensity and so it's for that reason, respectfully, grants the motion for summary disposition.

Kirkman now appeals.

II. STANDARD OF REVIEW

We review de novo a trial court's summary disposition ruling. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of

reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co Bd of Comm'rs*, 493 Mich 167, 175; 828 NW2d 634 (2013).

When a court reviews a motion for summary disposition under subrule (C)(10), it may consider only "the substantively admissible evidence actually proffered." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817. This requirement means that "only evidence whose content or substance is admissible can" be considered in reviewing a motion for summary disposition under subrule (C)(10). *Id*. at 123.

III. ANALYSIS

Kirkman advances two lines of argument for overturning the trial court's summary disposition ruling. First, Kirkman claims, Ellis bears strict liability for Magnum's actions because she knew that the dog liked to jump on the kitchen door. Kirkman's appellate brief summarizes the question presented under this theory quite succinctly: "The critical liability issue under this prong of animal liability law is whether Magnum's propensity to jump on the door constitutes, 'abnormal dangerous propensities.'" Kirkman premises her second argument on common-law negligence principles. She contends that Ellis knew that Magnum's door-jumping could pose a danger to human safety, thereby necessitating his restraint when guests were present. Because Magnum's proclivity to jump on the door does not qualify as abnormal for a dog, inherently dangerous, or foreseeably likely to cause injury, we reject both arguments.

A. STRICT LIABILITY

A dog owner is subject to liability for injuries caused by her dog's actions under either common-law strict liability or on negligence grounds. The former theory requires proof that the owner possessed the animal with knowledge of the dog's "abnormal dangerous propensities," and that the plaintiff's injuries resulted "from the dangerous propensity that was known or should have been known." *Trager v Thor*, 445 Mich 95, 99; 516 NW2d 69 (1994). "A plaintiff need not prove that the owner or custodian knew that his or her domestic animal had already attacked human beings when unprovoked to make a prima facie case of strict liability." *Rickrode v Wistinghausen*, 128 Mich App 240, 245; 340 NW2d 83 (1983). However, a plaintiff must present evidence that "the owner knew or had reason to know that the animal had a dangerous tendency that is unusual and not necessary for the purposes for which such an animal is usually kept." *Id*. at 245-246, citing 3 Restatement Torts, 2d § 509, comment c, p 16. In *Hiner v Mojica*, 271 Mich App 604, 609-610; 722 NW2d 914 (2006), this Court explained that "[t]he theory underlying common-law strict liability is that the liable party is deemed to have chosen to expose those around him to the abnormal danger posed by the animal he chooses to keep and must, as a consequence, shoulder any costs resulting from that danger." (Quotation marks, citation, and alteration omitted).

Magnum's door-jumping habit simply does not rise to the level of an "abnormally dangerous propensity." Dogs jump on doors for a variety of reasons, often because they need to go outside. Magnum's habit of jumping on the kitchen door reflects typical canine behavior despite that he apparently did so for reasons unrelated to obtaining access to the backyard. While a dog's tendency to jump on *people* might permit a dangerous propensity finding, jumping on a door is generally a harmless activity common to canines that does not countenance

condemnation as a threat to human safety. Thus, the circuit court properly dismissed Kirkman's strict liability claim.

B. NEGLIGENCE

Next, we turn to Kirkman's assertion that Ellis negligently allowed Magnum free range of the house when guests were present. In *Trager*, the Supreme Court recognized that under certain circumstances, an animal owner may be held liable for injuries caused by the animal if the owner negligently failed to prevent the injuries. The Court explained that "[i]n assessing whether duty exists in a negligence action of this type, it is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge." *Trager*, 445 Mich at 105. According to *Trager*, dogs generally are so unlikely to cause substantial harm that no duty exists "to keep them under constant control." *Id*. at 105-106. Therefore, "a mere failure" to keep a dog under constant control does not constitute a breach of any duty of care. *Id*. at 106.

An animal possessor's duty changes, however, if the possessor knows of a "dangerous propensity unique to the particular animal," or that if placed in a certain situation, "a danger of foreseeable harm might arise." *Id*. The standard of care requires that the animal's owner exercise the amount of control "which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." *Id*. (Quotation and citation omitted). The *Trager* Court adopted the following rule from *Arnold v Laird*, 94 Wash 2d 867, 871; 621 P2d 138 (1980), to be applied in a domestic animal injury case:

> "[A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." [*Trager*, 445 Mich at 106.]

Viewed in the light most favorable to Kirkman, the substantively admissible evidence of record demonstrates that Magnum's door-jumping had never before caused an injury, and lends no support to Kirkman's argument that Ellis knew or had reason to know that Magnum presented any unusual risk to guests.

The only evidence connecting Magnum's door-jumping to human injury was provided by Kirkman in her deposition. Kirkman claimed that Ellis's daughter, Tonya, described an incident involving Magnum's door-closing in which Tonya's daughter, Cassie, "got knocked down the stairs." Tonya's out-of-court statement qualifies as inadmissible hearsay. Kirkman has failed to identify any hearsay exception that would permit the statement's admission. Therefore, it is insufficient to establish a question of fact.

Even were we to consider Tonya's statement, however, we would reject Kirkman's negligence argument. As the Supreme Court held in *Trager*, a duty to constantly control one's

animal arises only if the animal's behavior creates a foreseeable risk of harm. Although Magnum had jumped on the door on other occasions, and even assuming the door had collided with Ellis or a child, no record evidence tended to establish that a small, 20-pound lap dog jumping on a door would foreseeably cause injury. Magnum's door-jumping in his own home did not create an unreasonable risk of harm to visitors obligating his restraint. Accordingly, the circuit court correctly granted summary disposition of Kirkman's negligence claim pursuant to MCR 2.116(C)(10).

We affirm.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher